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In the Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES W. WORRELL, d/b/a
CHEROKEE HOMES APARTMENTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner, the owner of an apartment complex in Georgia, was held in civil contempt for failing to comply with an injunction issued after he was adjudged to have discriminated on the basis of race in renting apartments, in violation of the Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.* Petitioner seeks review of the contempt order, but his contentions are clearly without merit. Accordingly, no further review is warranted.

1. In 1973, the United States brought suit against petitioner in the United States District Court for the Southern District of Georgia, alleging that he pursued a policy and practice of discrimination against blacks in the rental of apartments, in violation of the Fair Housing Act of 1968.

After a trial, the court entered judgment for the government. Petitioner was enjoined from committing further violations of the Act and was ordered to take certain remedial measures. He did not appeal (Pet. App. 1a-2a, 6a-7a).

In 1977, the government moved that petitioner be held in civil contempt for failing to obey the injunction. An evidentiary hearing was held, but the presiding district court judge died before issuing any findings of fact or conclusions of law (Pet. App. 7a). After the case was reassigned, a second district court judge held petitioner in contempt without conducting a new evidentiary hearing (*id.* at 13a), and the court of appeals affirmed (*id.* at 1a-4a).

2. Petitioner argues (Pet. 6-7) that the contempt order is invalid because the death of the first district court judge necessitated a new evidentiary hearing. It is settled that, if the parties agree, a new trial need not be held when a judge becomes disabled after trial but before issuing findings of fact and conclusions of law. *Arrow-Hart, Inc.* v. *Philip Carey Co.*, 552 F. 2d 711, 713 (6th Cir. 1977); C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2922, at 340 (1973). See generally Fed. R. Civ. P. 63. Petitioner argues that he did not enter into such a stipulation, but the district court found that petitioner had done so (Pet. App. 7a) and the court of appeals agreed (*id.* at 2a n.1). It is the settled practice of this Court not to review concurrent findings of fact by the district court and the court of appeals in the absence of a very obvious and exceptional showing of error. *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 16 (1978); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). Petitioner has made no such showing here. On the contrary, the transcript of the relevant proceeding below shows that the lower courts' findings were

correct. See Nov. 2, 1979 Transcript at 6-11, *United States* v. *Worrell*, Civ. Action No. 3193 (S.D. Ga.).[1]

3. Petitioner also contends (Pet. 7-8) that the civil contempt order should be reversed because the underlying judgment was erroneous. It is true that a party cannot be held in civil contempt for failure to comply with an invalid order. *United States* v. *United Mine Workers*, 330 U.S. 258, 294-295 (1947). However, the validity of an underlying order can be attacked in a contempt proceeding only if the party charged with contempt had no earlier opportunity to do so effectively. *Maggio* v. *Zeitz*, 333 U.S. 56, 68 (1948); *United States* v. *Secor*, 476 F. 2d 766, 770 (2d Cir. 1973); 9 *Moore's Federal Practice* para. 110.13[4], at 168 (2d ed. 1980). In this case, petitioner had the opportunity to appeal the adverse judgment in the original civil rights action but failed to do so. As a result, the order became "*res judicata* and not subject to collateral attack in * * * contempt proceedings." *Maggio* v. *Zeitz*, *supra*, 333 U.S. at 68.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1981

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[1] A copy of this transcript has been lodged with the Clerk of the Court.